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IN THE

Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL ENVIRONMENTAL DEVELOPMENT ASSOCIATION, THE AMERICAN PETROLEUM INSTITUTE, THE AMERICAN CHEMISTRY COUNCIL, THE AMERICAN FOREST & PAPER ASSOCIATION, AND THE CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL IN SUPPORT OF PETITIONER

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All parties consent to the filing of this brief.[1]

[1] No party or its counsel authored this brief in whole or in part nor made a monetary contribution to *amici* for the preparation or submission of it.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus curiae are trade associations that represent a significant cross-section of industry whose members apply for and receive many air pollution control permits each year – including Prevention of Significant Deterioration (PSD) and other New Source Review (NSR) permits. For this reason, *amici curiae* are uniquely qualified to offer insights to the Court on this complicated program.

Amicus curiae the National Environmental Development Association's Clean Air Regulatory Project (NEDA/CARP) is a coalition of manufacturing companies that represent major industrial sectors, including primary and secondary aluminum, aerospace, automobile manufacturing, natural resource exploration, refining and petrochemicals, pharmaceuticals, electronics, and home products. NEDA/CARP was formed in 1979, shortly after enactment of the 1977 Clean Air Act Amendments that codified PSD permitting requirements, to address Clean Air Act regulations and Environmental Protection Agency (EPA) guidance that affects the contents of PSD, NSR and later, operating permits, including requirements for construction of new sources like "best available control technology" (BACT). NEDA/CARP's members own and operate facilities that are major sources under the Clean Air Act, and thus they must obtain NSR permits when they build new major sources or seek to construct major modifications at existing major sources.

Amicus curiae the Corporate Environmental Enforcement Council (CEEC) is an organization of corporate counsel and environmental management representing over 30 major companies from a wide range of industrial sectors, including metals, chemicals, pharmaceuticals, paper, oil refining and natural resource exploration, aerospace, defense electronics and shipbuilding, mining, food and home products. CEEC focuses exclusively on civil and criminal environmental

enforcement and enforcement policy issues by providing a forum for review and discussion of such issues and developing constructive recommendations to executive and legislative environmental enforcement policymakers. As an amicus curiae in other cases, CEEC has presented its perspective on the legal and policy implications of EPA actions that substitute its enforcement judgments for the judgments of states with federally delegated enforcement and permitting authority. In addition, CEEC's members also own and operate major sources regulated by the Clean Air Act's NSR program, and spend substantial resources in researching, preparing and negotiating BACT determinations for NSR permits.

Amicus curiae the American Petroleum Institute (API) is a national trade association with approximately 400 members involved in all aspects of the oil and natural gas industry. API members own and operate numerous facilities in many states, including Alaska, that are subject to permitting actions similar to the one at issue in this case.

Amicus curiae the American Chemistry Council (the "Council") is a nonprofit trade association whose member companies represent more than 90 percent of the productive capacity for basic industrial chemicals within the United States. Council members apply the science of chemistry to make innovative products and services that make people's lives better, healthier, and safer. The Council is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The Council's 190 members represent 90% of the world's production of basic industrial chemicals. They spend more than $12 billion each year on projects designed to protect human health, safety and the environment.

Amicus curiae the American Forest & Paper Association (AF&PA) is the national trade association representing the

forest products industry. AF&PA has more than 120 member companies that grow, harvest, and process wood and wood fiber and manufacture a wide variety of products including pulp, paper, paperboard and wood products. AF&PA's member companies produce more than 92% of the nation's pulp, 78% of the nation's paper, 89% of the nation's paperboard, 60% of the nation's dimensional lumber, and 85% of the nation's wood panel products. These member companies operate hundreds of manufacturing facilities covered by Clean Air Act permits and other requirements. They must, therefore, make numerous BACT determinations similar to the ones at issue in this proceeding.

SUMMARY OF ARGUMENT

Industry invests substantial resources to modify its facilities and install pollution control equipment to protect human health and the environment. The governmental permitting decisions must be certain and final. The United States Court of Appeals for the Ninth Circuit has undermined these two critical objectives by its holding in *Alaska v. EPA*, 298 F.3d 814 (9th Cir. 2002). Permitting EPA to effectively nullify state permitting decisions months or even years after they are made will hinder or halt major capital projects designed to benefit the economy and the environment. This Court should conclude that Congress understood the need for certainty and finality in the permitting process to allow industry to make the significant capital investments to comply with permitting programs and should protect the integrity of state permitting decisions and the cooperative federalism embodied in the relevant provisions of the Clean Air Act.

ARGUMENT

I. CERTAINTY IS A CRITICAL COMPONENT OF THE NSR PERMITTING PROCESS.

A. The NSR Permitting Process is Complex, Time-consuming and Costly.

The New Source Review (NSR) program requires sources that emit certain pollutants to obtain air pollution permits prior to commencing construction of major new facilities or significant modifications of existing facilities. In areas where the air quality already meets the national ambient air quality standards (NAAQS) (*i.e.*, attainment areas), an applicant triggers the NSR Prevention of Significant Deterioration (PSD) requirements, including a commitment to use the "best available control technology" (BACT) on the unit it is constructing or modifying. In areas where the air quality exceeds a NAAQS (*i.e.*, nonattainment areas), an applicant triggers the NSR nonattainment requirements including application of the Lowest Achievable Emission Rate (LAER). The BACT or LAER determination is often the most critical determination that is made at the time an NSR permit is issued by a state permitting authority (or by the EPA region if the state does not have an approved NSR permit program as part of its State Implementation Plan (SIP)).

The process used to determine BACT for a new or modified emission unit is a complex one. For example, in October 1990, EPA released a draft New Source Review Workshop Manual, Cert. Rec. 71-001 to 71-343, which inter alia, contains 75 pages of guidance on conducting a BACT analysis. There is no "correct" answer in the BACT determination process. Instead, the BACT analysis is done on a "case-by-case" basis, and involves a weighing of a

number of factors including energy, environmental and economic impacts and other costs. 42 U.S.C. § 7479(3). The "top-down" method recommended (but not required) by EPA in the Draft New Source Review Workshop Manual for determining BACT ranks available control technologies in order of control effectiveness. The method consists of five detailed analyses: identification of available control technologies, elimination of technically infeasible options, ranking of control technologies by control effectiveness, evaluation of most effective controls and documentation of results and the selection of BACT. Cert. Rec. 71-089 to 71-093.

In its Draft NSR Workshop Manual, EPA repeatedly recognizes that numerous subjective judgments must be made in each and every step of the BACT analysis. Indeed, the Draft New Source Review Workshop Manual is replete with references to the exercise of "judgment" by the applicant and the reviewing authority.[2]

In conducting a BACT analysis, complex technical issues relating to the appropriate emission factors for different controls, accurate cost estimates of different controls (both

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[2] *See, e.g.*, Draft New Source Review Manual at B.13, Cert. Rec. 71-097 (However, there may be instances where, in the permit authority's judgment, the consideration of alternative production processes is warranted and appropriate for consideration in the BACT analysis), B.19, Cert. Rec. 71-103 ("Technical judgment on the part of the applicant and the review authority is to be exercised in determining whether a control alternative is applicable to the source type under consideration), B.20, Cert. Rec. 71-104 ("Consequently, judgment should be used in deciding what alternatives will be evaluated in detail in the impacts analysis (Step 4) of the top-down procedure discussed in a later section"), B.24, Cert. Rec. 71-108 ("Consequently, in assessing the capability of the control alternative, latitude exists to consider any special circumstances pertinent to the specific source under review, or regarding the prior application of the control alternative").

installation and annual operation), and the practicality of certain control strategies can arise at every turn. Reasonable minds can disagree on these issues at every stage of the BACT analysis; as a result, the final BACT determination is often the result of the exchange of research, discussion, negotiation and cooperation between the permit applicant and the state permitting authority.

The NSR permitting process conducted by the state, including the BACT analysis, can take more than two years. Many SIPs provide for a 30-day completeness review, a 60-day technical review, a 30-day comment period and a 30-day period for a public hearing. In some instances, the 30-day completeness review re-starts if deficiencies must be addressed. In its Report to the President on New Source Review, EPA reported that permitting typically takes from 7 to 22 months. EPA, *New Source Review: Report to the President* at 31 (2002). In fact, the State of Alaska spent 18 months reviewing and analyzing the NSR permit application in this case.

Indeed, the entire process of making modifications to an existing source is a lengthy one. For example, the following chart sets forth the timeframe associated with a significant modification to a major refinery; the total time is five to seven years, including 1.5 years for basic process design and 1.5 to 2 years for the permitting process.

Action	General Time Range
Scoping/screening studies	1.5 years
Basic process design	1.5 years (0.5 overlap with with scoping studies)
Permitting	1.5 to 2 years (0.75 overlap with process design phase)
Detailed engineering	1.25 to 1.5 years (0.75 to 1 overlap with permitting and design phase)
Construction	1.5 to 2 years (0.5 overlap with detailed engineering phase)
Startup-up/shakedown	0.5 to 1 year

Total of 5 to 7 years

Even in the best of circumstances, the refinery modification process takes five to seven years. Obtaining a major NSR air permit, which is an integral part of the modification process, can take two or more years, particularly if pre-construction modeling is needed to assure the attainment status of the area. While this example is from the oil and natural gas industry, securing a major NSR air permit is a complex and lengthy process for any facility, regardless of industry sector.

B. Permit Applicants Make Significant Financial and Manpower Investments in the Development of BACT Determinations.

The process of obtaining an NSR permit is a costly one as well. The entire air permitting process can cost as much as $500,000. In particular, the analysis of BACT frequently requires the retention of independent environmental and engineering professionals, and entails lengthy periods of

discussion and often negotiations with state permitting authorities before a BACT determination is formally made by the state permitting authority. Often the engineering and design move forward hand in hand with informal discussions with state permitting authorities and may not be finished until the question of BACT is resolved.

The BACT process involves frequent communication and correspondence and extensive negotiations between the permit applicant and the state permitting authority, often resulting in concessions by the permit applicant. When the state permitting authority has made its preliminary BACT determination, the typical SIP provides for a public comment period for the proposed permit. *See, e.g.*, Alaska Admin. Code § 50.315. At the conclusion of the public comment period and upon issuance of the permit, most SIPs also contain a provision authorizing persons to request a hearing on the permit as issued, and to seek judicial review of a final permitting agency's decision. *Id.* Thus, the process involves a significant investment by the applicant in time, money and manpower to work through the NRS permitting process.

C. The Significant Investment by Permit Applicants in the Negotiation Process is Premised on the Authority of the State Permitting Authority and the Finality of its Determination.

As set forth above, permit applicants invest significant time and resources in the BACT determination process. Accordingly, as even EPA recognizes, [3] applicants need reasonable certainty in the BACT determination process.

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[3] For example, in its 1990 Draft New Source Review Workshop Manual, EPA "encourages" applicants to discuss the judgments they are making as to which alternatives will be evaluated with the reviewing authority in the pre-application meeting. Draft New Source Review Workshop Manual at B.21, Cert. Rec. 71-105.

However, there is little incentive to participate in meaningful discussions with a state permitting authority and to make meaningful concessions if EPA can choose not to participate in the state permitting process yet exercise post-permit issuance ultimate veto authority over the state permitting decision. With a potential EPA veto hanging over permit applicants' heads for years as well as potential substantial Clean Air Act penalties,[4] applicants will have little incentive to work with the states or to make significant concessions. The erosion of the state permitting authorities' ability to work with applicants in approving BACT determinations will make it increasingly difficult for states to run efficient and environmentally protective air permitting programs.

If EPA can simply ignore a state permitting authority's NSR permitting decision made in accordance with procedures adopted by the state and incorporated into the EPA-approved SIP, and issue an enforcement order to overturn that decision, regulated entities will be forced to request that EPA "pre-approve" any and all NSR permits to eliminate that possibility. This not only undermines the responsibility and credibility of the state permitting authority, it also encroaches on federalism and the federal-state relationship in SIP-approved states. Finally, given its finite resources, EPA is not likely to be in a position to consider meaningfully all such requests, and certainly not in a timely fashion.

At the same time, states will find it more and more difficult to negotiate BACT determinations because they will not be

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According to EPA, "In this way, the applicant can be better assured that the analysis to be conducted will meet BACT requirements." Id.

[4] The Clean Air Act provides for penalties of up to $27,500 per day for each violation as well as other noncompliance and criminal penalties. 42 U.S.C. §§ 7413(c) and (e), 7420.

able to provide the needed certainty to permit applicants. As a result, industry will find its ability to make investments and modify its facilities in response to changing market conditions severely hampered. The bottom line is that permit applicants will be reluctant to invest time and money in working with the state permitting authority in the absence of certainty with respect to the final air permit.

D. Finality is Critical to Permit Applicants Because of the Significant Capital Investment in BACT.

If regulated entities cannot be certain whether a permit decision is truly final, they will be unable to rely on their dealings with state officials. This in turn will have a chilling effect on capital projects and interfere with the ability of the regulated community to plan and make investments in their facilities.

The pollution control technology representing BACT can result in the expenditure of millions of dollars in both capital costs and operational and maintenance costs. For example, the capital investment in BACT for a large industrial boiler can run between $1 million and $20 million. If there is uncertainty as to the appropriate (and lawful) BACT control strategy, the potential additional costs associated with that uncertainty could cause an owner or operator to decide against making that capital investment.

By way of example, if EPA were to issue an enforcement order requiring additional controls after a permittee had ordered or installed control equipment required by the state-issued permit, the additional costs to be incurred by the permittee are compounded because change orders are extremely expensive. For instance, for some equipment, ultra Low-NOx combustors are frequently approved as BACT. However, if EPA later announced its belief that Selective Non-Catalytic Reduction (SNCR) (an expensive and

controversial control that raises other issues) was BACT for a particular project, depending on design and size, the additional cost of the new equipment alone could add 65% to 100% to the NOx control cost or 15% to 30% to the total project cost for installation of an industrial boiler. If SNCR controls must be added after equipment construction has begun, or after the installation is complete, the total project cost could be further increased by 15% to 30% or more.

For projects near the economic viability threshold, these added costs might destroy the economics of the expansion or modernization project. Meaningful facility upgrades and environmentally beneficial improvements could be scrapped if the projects would not be economical in light of the risk of increased costs due to late EPA veto of the BACT determination - even though such costs might never actually materialize.

Industry simply cannot proceed with major capital projects if there is no finality to permitting decisions and capital costs cannot be determined with the necessary accuracy. Indeed, if state permitting decisions are overturned by EPA years after the equipment has been installed, the costs to the source - - in new equipment and/or penalties or fines - - would be staggering. This lack of finality in the air permitting process would significantly deter or even halt investments in facility improvements that provide increased productivity, efficiency and environmental benefits.

The economic harm to an owner or operator due to a "late hit" from EPA must also be measured in lost productivity and profits. If the owner or operator receives an enforcement order from EPA that stops it from completing construction of a production unit, or the operation of a completed production unit, the cost to the owner or operator in terms of lost productivity could be crippling. For example, a typical 1000 ton per day pulp and paper mill receives a revenue stream of approximately $600 to $900 per ton or $600,000 to $900,000 per day. If forced to shut down a unit in operation, the lost

revenue to such a mill could approach $1 million per day. Similarly, to close or delay a new pharmaceutical production process could mean lost revenues of $1 million per day. In such circumstances, the shutdown may extend for months or years.

Thus, applicants will be left in limbo if EPA regional offices can choose to retain post hoc veto authority through their enforcement powers months or even years later. Moreover, the mere uncertainty as to whether EPA will step in later to override the state permitting authority's decision will hinder significant capital projects and impede economic growth. Accordingly, this Court should not permit EPA to upset industry's settled and reasonable expectations with respect to the BACT determination process by subjecting industry to a regulatory environment fraught with enforcement uncertainty.

II. STATE IMPLEMENTATION PLANS PROVIDE PROCEDURES FOR EPA TO PARTICIPATE IN THE PERMITTING PROCESS, AND THOSE PROCEDURES CONTAIN ADEQUATE SAFEGUARDS FOR EPA.

A. State Implementation Plans, Which are Approved by EPA, Provide Adequate Safeguards to Ensure EPA Input into Permitting Decisions.

The permitting procedures built into SIPs, including those that provide for a public comment process, provide ample opportunity for EPA to participate in the permitting process. *See, e.g.*, Alaska Admin. Code § 50.315; 42 U.S.C. §7545(a)(2). Thus, EPA has a built-in mechanism to use if it believes that a state's conclusions regarding BACT are incorrect. The state permitting agency must consider all

comments made, including those made by EPA challenging a BACT determination, in issuing a final NSR permit. Alaska Admin. Code § 50.315. As a practical matter state permitting authorities give significant weight to timely comments provided by EPA.

Industry does not object to EPA weighing in on state permitting decisions, but such participation should take place in a timely fashion and within the confines of the permitting process as set forth in the EPA-approved SIP. What is critical to industry is that at the end of the lengthy and costly state permitting process, the source has a permit in hand that defines its obligations once and for all. Once a permit is issued by the state, the source must be able to rely upon it. With clear and final direction from the state permitting authority, the source can proceed with its project free of the uncertainty that is present if EPA retains the authority to issue a post hoc enforcement order vetoing the state permitting decision.

B. EPA Should Be Required to Utilize Available Administrative Review Processes, Including Judicial Review of a State Permitting Decision, Rather than Issuing Unilateral Post Hoc Enforcement Orders

In circumstances where EPA disagrees with a state's BACT determination, that disagreement is properly viewed as a program administration dispute between the two sovereigns. In that instance, the CAA and the EPA-approved SIP provide a mechanism for resolution of that dispute – EPA may participate in the public comment process and, where its comments are not addressed to its satisfaction, further challenge the state's decision through the state administrative and judicial appeal process, applying the applicable rules contained in the SIP. In the case at bar, the Alaska administrative process provides the opportunity for

EPA to participate in the public comment process, to request an adjudicatory hearing on the permit decision, and ultimately to seek judicial review of Petitioner's permit decision. Alaska Admin. Code § 50.315; Alaska Stat. § 46.14.200.

Both the Court of Appeals for the Seventh Circuit and the District Court for the Western District of Wisconsin have addressed the issue of whether EPA can mount a collateral attack on a state permit decision by bringing an enforcement action against the party that was issued the Clean Air Act permit and was in compliance with that permit, where the EPA did not appeal the issuance of the permit. In *U.S. v. AM General Corp.*, 34 F.3d 472 (7th Cir. 1994), the Seventh Circuit dismissed an enforcement action brought by EPA, pursuant to Section 113(a)(5) and 113(b)(3),[5] on the grounds that EPA did not appeal issuance of the permit pursuant to the applicable provisions of the applicable county and state review procedures, including obtaining review in state court. *AM General*, 34 F.3d at 474-475. In *U.S. v. Murphy Oil USA, Inc.*, 143 F.Supp.2d 1054 (W.D. Wis. 2001), the District Court cited to the Seventh Circuit's opinion in *AM General* and held that where a valid permit was issued by the state agency, EPA could not seek review of the validly issued permit in the context of an enforcement action – it must challenge the issuance of the permit pursuant to the applicable state provisions regarding challenges to state permitting decisions. Applying the logic of these cases, EPA should have expressed its views in the state permitting process and pursued its disagreement with Petitioner's BACT determination through a challenge to the permit issued by the Petitioner, pursuant to the procedures set forth in the Alaska statutes and code cited above.

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[5] The Seventh Circuit noted that the statutory sections cited by EPA in *AM General Corp.* were amended in 1990, but that the amendments did not seem pertinent to the issue decided by that court.

It is patently unfair (especially in light of the staggering costs outlined above) to use the regulated entity as a pawn in the resolution of a dispute among sovereigns, as occurred in the instant case. It is particularly egregious for EPA to do so by issuing an enforcement order to the permit applicant that had followed all applicable procedural and substantive permitting requirements, when EPA failed to follow the administrative process that EPA itself approved as part of the Alaska SIP. Finally, the course of action chosen by EPA also threatens to completely undermine the credibility of state permitting processes and the administrative processes established by states to provide for review of permitting decisions. *See* Brief of Amici Curiae States of North Dakota, Wyoming, Alabama, Delaware, Iowa, Montana, Nebraska, Nevada, South Dakota and Utah in Support of Petitioner's Petition For Writ Of Certiorari, pp. 11-12.

CONCLUSION

For the forgoing reasons, the judgment below should be reversed.

Respectfully submitted,

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